

THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Bail Application No. 04 of 2021

Phurba Lhamu Tamang,
W/o Amber Chettri,
Aged about 27 years,
Upper Pachak,
P.O. Duga & P.S. Rangpo,
East Sikkim.

*Presently lodged at Central Prisons,
Rongyek, East Sikkim.*

..... **Applicant**

Versus

State of Sikkim

..... **Respondent**

**Application under section 439 of the
Code of Criminal Procedure, 1973.**

Appearance:

Ms Zola Megi, Advocate for the applicant.

Ms Pema Bhutia, Assistant Public Prosecutor for the respondent.

Date of hearing : 23.02.2021 & 24.02.2021

Date of order : 26.02.2021

ORDER

Bhaskar Raj Pradhan, J.

1. An application for bail under section 439 of the Code of Criminal Procedure, 1973 (Cr.P.C.) has been filed on 22.01.2021 by the applicant who has been charge-sheeted by the respondent. The learned Sessions Judge, East Sikkim at Gangtok (the learned Sessions Judge) has framed charges under sections

302 and 201 of the Indian Penal Code, 1860 (the IPC) against the applicant on 17.07.2020. Out of 21 prosecution witnesses, only one witness has been examined till date.

2. According to the prosecution, on 03.06.2019 a written report was received from the panchayat member of Upper Pachak, East Sikkim, stating that one Passang Kinzi Sherpa of the same village was found dead in the courtyard of the house owned by the applicant. Based on the information, Rangpo P.S U.D Case No. 10/2019 dated 03.06.2019 under section 174 Cr.P.C. was registered and endorsed to the Investigating Officer for investigation. During the investigation, the Investigating Officer found certain suspicious circumstances and on further examination, one witness named Nirmala Rai of Upper Pachak disclosed that the applicant had killed the deceased by twisting her neck inside the sitting room of the house. On receipt of the post mortem report, Rangpo P.S Case No. 18/2019 dated 20.06.2019 under sections 302/201 IPC was registered and investigated. The charge-sheet was filed thereafter. The applicant was arrested on 24.12.2019 and since then she continues to be incarcerated.

3. On 26.02.2020, the applicant preferred an application for bail under section 439 Cr.P.C. before the learned Sessions Judge which was heard and rejected on 03.03.2020 on the

ground that the offences involved were serious, rather heinous in nature and the materials indicated her involvement. It was also noted that the trial was yet to commence and the witnesses, including vital witnesses, were yet to be examined.

4. On 17.07.2020, the learned Sessions Judge framed charges under sections 302 and 201 IPC against the applicant. Dates were fixed for examination of two witnesses on 08.10.2020 and 09.10.2020. However, since the witness summoned on 08.10.2020 was absent on that day, summons was reissued to him returnable on 04.02.2021. On 04.02.2021, the witness was absent again and fresh summons was issued to him returnable on 17.06.2021.

5. On 09.10.2020, Ms Nirmala Rai, the witness summoned on that day, was absent and fresh summons was issued returnable by 08.02.2021. On the said date, further dates for examination of other witnesses were fixed between 18.02.2021 to 24.03.2021. On 08.02.2021, Ms Nirmala Rai who was scheduled to be examined was present but could not be examined as she was unwell and not in a position to give evidence. She was accordingly directed to appear on 21.06.2021.

6. Ms Zola Megi, learned counsel for the applicant, submits that the applicant is a young woman aged 27 years.

According to her, on the date she was taken into custody, she had a minor child, barely two months old, who is also presently lodged with her at Rongyek Central Prisons. It is submitted that the applicant is a permanent resident of Upper Pachak, East Sikkim and therefore, unlikely that she would flee from justice. It is also submitted that the applicant is separated from her husband. Ms Zola Megi submits that the applicant has already spent one year and two months in jail along with her minor child and there is no likelihood of the trial completing in the near future. She further submits that although the prosecution seeks to rely upon the statement of Ms Nirmala Rai against the applicant, other witnesses have stated that the deceased had died as a result of falling down. The learned counsel submits that if granted bail, the applicant would abide by all conditions imposed and furnish a reliable surety. Ms Zola Megi relied on ***Maulana Mohammed Amir Rashadi vs. State of Uttar Pradesh and Another***¹, ***P. Chidambaram vs. Central Bureau of Investigation***², ***Sanjay Chandra vs. Central Bureau of Investigation***³.

7. Ms Pema Bhutia, learned Assistant Public Prosecutor, on the other hand, vehemently objects to the grant of bail. According to her, the offence alleged to have been committed by the applicant is of heinous nature and vital witnesses are yet to

¹ (2012) 2 SCC 382

² AIR 2019 SC 5272

³ (2012) 1 SCC 40

be examined. As the applicant hails from the same village, where most of the witnesses hail from, there is all likelihood that she would influence them. It is also submitted that the applicant's child is well taken care of in the Rongyek Central Prisons following the guidelines laid down by the Supreme Court in ***R.D. Upadhyay vs. State of Andhra Pradesh and Others***⁴.

8. Ms Zola Megi would seek to allay the apprehension posed by the learned Assistant Public Prosecutor of influencing the witnesses by submitting that the applicant is willing to stay away from Upper Pachak and live with her sister at Pakyong during the period of trial, if granted bail.

9. In ***P. Chidambaran*** (supra), the Supreme Court held as follows:

“**22.** There is no hard-and-fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner.

23. In *Kalyan Chandra Sarkar v. Rajesh Ranjan* [*Kalyan Chandra Sarkar v. Rajesh Ranjan*, (2004) 7 SCC 528 : 2004 SCC (Cri) 1977] , it was held as under: (SCC pp. 535-36, para 11)

“**11.** The law in regard to grant or refusal of bail is very well-settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having

⁴ (2007) 15 SCC 337.

committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upadhyay v. Sudarshan Singh* [*Ram Govind Upadhyay v. Sudarshan Singh*, (2002) 3 SCC 598:2002 SCC (Cri) 688] and *Puran v. Rambilas* [*Puran v. Rambilas*, (2001) 6 SCC 338 : 2001 SCC (Cri) 1124] .)”

24. Referring to the factors to be taken into consideration for grant of bail, in *Jayendra Saraswathi Swamigal v. State of T.N.* [*Jayendra Saraswathi Swamigal v. State of T.N.*, (2005) 2 SCC 13 : 2005 SCC (Cri) 481] , it was held as under: (SCC pp. 21-22, para 16)

“16. ... The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in *State v. Jagjit Singh* [*State v. Jagjit Singh*, AIR 1962 SC 253 : (1962) 1 Cri LJ 215] and *Gurcharan Singh v. State (Delhi Admn.)* [*Gurcharan Singh v. State (Delhi Admn.)*, (1978) 1 SCC 118 : 1978 SCC (Cri) 41] and basically they are — the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case.”

10. It is seen that although charges were framed on 17.07.2020, only one witness has been examined till date. The records reveal that dates have been set for examination of prosecution witnesses till 21.06.2021. There is no likelihood of the trial completing in the near future. In the reply filed by the State respondent, the two grounds taken is the likelihood of the applicant influencing the witnesses and the offence being heinous in nature. The charge-sheet does not reflect any material which would show that the applicant had been previously

convicted for any offence. It is also to be noted that the offence charged against the applicant is heinous and most of the witnesses are yet to be examined including Ms Nirmala Rai, who is sought to be heavily relied upon by the prosecution. The records reveal that her statement under section 164 Cr.P.C. had been recorded. The applicant is not only a woman but also with a minor child who is, due to her circumstances, also lodged at Rongyek Central Prisons. The applicant has already spent more than a year of incarceration along with the child. The apprehension of the learned Assistant Public Prosecutor is logical but without any material to support it. The apprehension can be safe guarded by laying down strict conditions for bail.

11. This court has examined the nature of accusations made and supporting evidence, reasonable apprehension of tampering with the witnesses, the circumstances peculiar to the applicant and the reasonable possibility of the presence of the applicant during trial. In the circumstances, this court is of the view, keeping in mind the well settled principles laid down by the Supreme Court, that the applicant should be granted bail on her furnishing security to the satisfaction of the learned Sessions Judge on the following additional conditions:-

- i. The applicant shall, during the entire period of trial, stay with her sister at Pakyong and away from Upper Pachak, East Sikkim. She shall

provide the Investigating Officer and the trial court with her active mobile number as well as the mobile number of her sister. She shall also provide the full postal address of her sister to the trial court and the Investigating Officer.

- ii. The applicant shall report to the Station House Officer of the Pakyong Police Station on every Monday at 10:30 a.m. and if that day happens to be a date fixed for trial then on the next working day at the same time on which day she is not required for the trial.
- iii. The applicant shall not approach or try to influence any of the prosecution witnesses, either directly or indirectly.
- iv. The applicant shall not leave the jurisdiction of the Pakyong Police Station without the written permission of the Investigating Officer except to attend the trial before the learned Sessions Judge.
- v. The applicant shall attend each and every date set for trial before the learned Sessions Judge.

12. The learned Sessions Judge shall be at liberty to take steps to send the applicant back to jail in case of breach of any of the conditions imposed on the applicant. The Investigating Officer shall monitor the applicant and take all necessary steps to protect the prosecution witnesses.

13. The bail application is allowed and accordingly disposed of.

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14. Certified copies of this order shall be furnished to the applicant, the learned Sessions Judge as well as the Investigating Officer for compliance.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting: **Yes/No**
Internet : **Yes/No**

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